United Nations A/CN.4/525/Add.1

General Assembly

Distr.: General
17 April 2002
English
Original: English/French/Spanish

International Law Commission
Fifty-fourth session
Geneva, 29 April-7 June and
22 July-16 August 2002

Fifth report on unilateral acts of States*

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Addendum

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* Complexity of issues dealt with in the report resulted in the delayed submission of the present document.

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II. Recapitulative examination of some basic issues (continued)

B. Conditions of validity and causes of invalidity of unilateral acts

82. The second question addressed in this part concerns the conditions of validity and causes of invalidity of unilateral acts; the latter aspect was partially considered by the Commission at its fifty-second session, in 2000, on the basis of the third report submitted by the Special Rapporteur.[64]

83. This year the Working Group of the Commission will take up the draft article submitted by the Special Rapporteur on invalidity of unilateral acts; in that connection, it will need to take into account the discussions in the Commission and the views expressed by representatives in the Sixth Committee of the General Assembly in 2000 and 2001, along with the clarifications and additions provided in the Working Group. Before addressing the matter again, we will consider several issues in an effort to clarify the status of the discussion, namely, conditions of validity of unilateral acts and the general regime governing the invalidity of unilateral acts, issues that, as has been pointed out, are clearly closely related. Preliminary comments will also be made on two issues related to invalidity: loss of the right to invoke a cause of invalidity or a ground for termination of a unilateral act, or to suspend its application, and the relation between domestic law and competence to formulate an act. Preliminary consideration will also be given to other issues relating to the non-application of the act, namely, termination and suspension.

84. A unilateral act is valid and can therefore produce its legal effects if certain conditions are met, as provided for in the Vienna regime concerning treaties. Articles 42 to 53 and 69 to 71 of the 1969 Vienna Convention should be recalled in this context.

85. Following the Vienna regime to some extent, and using it as a guide, the conditions of validity of the unilateral acts with which we are concerned would be: formulation of the act by a State, by a representative authorized or qualified to act on its behalf and commit it at the international level; lawfulness of the object and purpose, which must not conflict with a peremptory norm of international law; and the manifestation of will, free of defects. Certain other, related issues should be considered at the same time as validity and causes of invalidity, such as the relation between unilateral acts and prior obligations assumed by the author State.

86. In order to regulate the functioning of unilateral acts, the conditions of validity of such acts do not need to be set forth in a specific provision of the draft articles, any more than they were in the Vienna Conventions. When the Commission elaborated the draft articles on the law of treaties, it considered a draft article (article 30), which established a general rule concerning validity of treaties and which was not adopted subsequently.[65] The view at the time was that such a rule

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[64] A/CN.4/505.

[65] The Special Rapporteur submitted draft article 30 "in order to underline that any treaty concluded and brought into force in accordance with the draft articles governing the conclusion and entry into force of treaties is to be considered as being in force and in operation unless the contrary is shown to result from the application of the articles dealing with the invalidity, termination and suspension of the operation of treaties". *Yearbook ... 1965*, vol. II, p. 65, document A/CN.4/477 and Add.1 and 2.

was unnecessary and that, accordingly, the draft article submitted by the Special Rapporteur should be deleted.

87. In any case, it should be underlined that the inclusion of draft articles on the causes of invalidity of unilateral acts cannot weaken the principle established in this context to serve as a basis for the binding character of such acts (*pacta sunt servanda*) and the stability and mutual confidence that should govern international legal relations, any more than the provisions included in the Vienna Convention of 1969 that deal with the principle *pacta sunt servanda*.

88. Only the State can formulate unilateral acts, at least in the context in which the Commission has addressed the topic. The State has legal capacity to formulate unilateral acts, just as it has to conclude treaties, a point that was clearly reflected in the Vienna Convention 1969. Such capacity is beyond doubt, as reflected in draft article 2, submitted in the third report of the Special Rapporteur, which was referred to the Drafting Committee. Of course, while the draft article is limited to the State, that does not exclude other subjects of international law from also having the capacity to formulate such acts. The limitation results from the mandate given to the Commission to study the topic and from the object and purpose defined in accordance with that mandate.

89. Moreover, only qualified persons can act on behalf of the State and commit it in its international relations, a point addressed in draft article 3, which has already been considered by the Commission and referred to the Drafting Committee. There is no question regarding the representativeness of the Head of State,[66] the Head of Government or the Minister for Foreign Affairs,[67] as set forth in article 7 of the Vienna Convention of 1969, on which the draft concerning unilateral acts is based. The point, as noted in the second report submitted by the Special Rapporteur, is that unilateral acts can be formulated only by a person qualified to act on behalf of the State and commit it at the international level. According to the report, "States can be engaged at the international level only by their representatives, as that term is understood in international law, that is, those persons who by virtue of their office or other circumstances are qualified for that purpose".[68]

90. The determination of the persons capable of formulating unilateral acts on behalf of the State depends on the circumstances and on the internal structure and nature of the act.

91. In addition to the persons referred to in the previous paragraph, the Special Rapporteur suggested that other persons could be qualified to formulate a unilateral act on behalf of the State. The determination of persons qualified for that purpose, it

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[66] The International Court of Justice affirmed in the *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures*, that "the power of a Head of State to act on behalf of the State in its international relations is universally recognized". *I.C.J. Reports 1993*, para. 13, p. 12.

[67] The Permanent Court of International Justice noted in the *Eastern Greenland* case that "The Court considers it beyond all dispute that a reply of this nature given by the Minister of Foreign Affairs on behalf of his Government ... is binding upon the country to which the Minister belongs". P.C.I.J., 1933, *Series A/B*, No. 53, p. 71. The decision of the International Court of Justice in the *Nuclear Tests* case also establishes the capacity of the Minister for Foreign Affairs to act on behalf of the State and commit it in its international relations. *I.C.J. Reports 1974*, pp. 266-269.

[68] See A/CN.4/500/Add.1, para. 79.

should be specified, depends both on domestic, mainly constitutional, law, and on international law. It will be recalled that when the Special Rapporteur submitted his second report to the Commission, he noted that "the intention of the State which formulates the act and the good faith that should govern international relations suggest that other representatives, in addition to those mentioned, can also commit the State without the need for special powers, as is clearly reflected in international practice".[69] The conclusion could have been drawn, however, that that could happen only on the basis of a restrictive criterion. When the Commission discussed the topic, it concluded that while it was possible to add to the persons qualified to act on behalf of the State, it should be approached restrictively; that view was also expressed by some Governments, such as Argentina, which, in replying to the above-mentioned questionnaire from the Commission, pointed out that "any addition of other persons or organs to this established norm of customary law must be approached restrictively, bearing in mind contemporary international realities".[70] As one Government stated in its reply to the 1999 questionnaire, in accordance with a well-established norm of international law, acts of the Head of State, Head of Government or Minister for Foreign Affairs are attributable to the State. However, it added, there is a possibility that other ministers or officials may also act unilaterally on behalf of the State.[71]

92. Pursuant to the preparatory work of the Vienna Convention on the Law of Treaties and the Commission's studies and discussions on the subject, State practice, legal doctrine and case law concur that the assumption of obligations is a limitative power; in other words, that the explicit powers of governmental representatives should be taken into account, although the general rule prevents the domestic norms from being invoked in order to challenge the validity of a treaty.[72]

93. The same cannot be said for the current status of international law concerning international responsibility, where, as reflected in the draft articles elaborated by the Commission, of which the General Assembly took note in 2001, particularly articles 7 to 9 thereof, the international responsibility of a State can arise through the conduct of its representatives, even though they have not been authorized for that purpose, and even through "the conduct of a person or group of persons ... if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct", and through "the conduct of a person or group of persons ... if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority".[73] It should be noted, however, that in such situations we refer to explicit obligations previously recognized by States or by international law

[69] See A/CN.4/SR.2593, p. 11.

[70] See A/CN.4/511, p. 9.

[71] Reply by the Government of Argentina, loc. cit.

[72] In 1966 the Commission noted that "when the violation of internal law regarding competence to conclude treaties would be *objectively evident to any State dealing with the matter normally and in good faith*, the consent to the treaty purported to be given on behalf of the State may be repudiated". *Yearbook ... 1966*, vol. II, p. 242, para. (11) of the commentary on article 43, document A/6309/Rev.1 (emphasis in original).

[73] General Assembly resolution 56/83, annex.

in general.[74] Clearly, the need to guarantee legal relations and mutual confidence justify such an extension of responsibility, although it is envisaged restrictively. In that connection, it is interesting to note the reply to the above-mentioned questionnaire by another Government, which stated that "It could be argued that in the realm of unilateral acts, all persons who may be deemed mandated by virtue of their tasks and powers to make pronouncements that may be relied upon by third States can be regarded as having the capacity to commit the State."[75]

94. A second condition of validity of unilateral acts is the lawfulness of their object and purpose. A unilateral act that conflicts with a peremptory norm of international law is absolutely invalid. The invalidity of an act because it is contrary to a peremptory norm or *jus cogens* should be distinguished from the situation that exists when a unilateral act conflicts with a previous act, be it a conventional or a unilateral act. In that regard, as one author rightly points out, "when ... the subsequent act is contrary to previous norms having the character of *jus cogens*, the Court is obliged to leave it unapplied, on grounds of absolute invalidity".[76] Thus, the State is free to formulate unilateral acts outside the framework of international law, but such acts cannot be contrary to *jus cogens* norms. This means that a State cannot avail itself of the possibility of going outside the international legal order in order to transgress peremptory legal norms.[77]

95. The question of the effects of a unilateral act that is contrary to a previous act, be it a conventional or a unilateral act, and in fact contrary to a norm of general international law, will be addressed below. It is well known, however, that a unilateral act should not contravene existing treaty norms, as affirmed by legal doctrine and judicial precedents. In the *Eastern Greenland* case, the Permanent Court of International Justice considered that the 1931 declaration of occupation of that territory by the Norwegian Government was "unlawful and invalid", as it constituted a violation of the existing legal situation.[78]

96. The International Court of Justice expressed a similar view in the *Continental Shelf* case, involving a dispute between Tunisia and the Libyan Arab Jamahiriya, when it stated that: "The Court would therefore observe at the outset that an attempt by a unilateral act to establish maritime boundary lines regardless of the legal position of other States is contrary to recognized principles of international law."[79]

97. The final condition of validity of a unilateral act concerns the manifestation of will, which must be free of defects, as set forth in the law of treaties; the Special Rapporteur specifically addresses that issue in his third report.

98. The regime governing invalidity is certainly one of the more complex aspects of the study of legal acts in general. In the present context, invalidity logically refers to international legal acts, in other words, acts intended to produce legal effects at the international level in accordance with the author's intention. Prior to Vienna, this regime, of extreme importance in the domestic sphere, had not been examined in

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[74] See *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10).

[75] See the reply by the Government of the Netherlands, A/CN.4/511, p. 11.

[76] J. H. W. Averzijl, "La validité et la nullité des actes juridiques internationaux", in *Revue de Droit International*, vol. XV, 1935, pp. 321-322.

[77] Julio Barberis, "Los actos jurídicos unlaterales como fuente de derecho internacional público", in *Obra Homenaje a M. Diez de Velasco* (Madrid, 1993), p. 113.

[78] P.C.I.J., 1933, *Series A/B*, No. 53, p. 75.

[79] *I.C.J. Reports 1982*, para. 87, p. 52.

greater depth in the context of international law. Previously existing rules of customary law were embodied in the Vienna Convention on the Law of Treaties. The strong influence of domestic law can also be seen in the elaboration of the rules on invalidity contained in the Vienna Conventions.

99. Consideration of the regime concerning invalidity of legal acts involves a variety of situations which reflect its complexity. It is necessary to distinguish between absolute and relative invalidity, between non-existence of the act and invalidity, between invalid acts and acts that can be made invalid, between partial invalidity and total invalidity; all of this is mentioned in some way in the law of treaties codified in Vienna. Absolute invalidity means that the act cannot be confirmed or validated; this happens when the act conflicts with a peremptory norm of international law or of *jus cogens* or when the act is formulated as a result of coercion of the representative of the State or when similar pressure is brought to bear on the State that is the author of the act, contrary to international law. Where there is relative invalidity, on the other hand, it is possible to confirm or validate the act. Such would be the case, for example, when the author State has erred or when the will has been expressed in violation of a fundamental domestic norm regarding competence to formulate the act. The author State may, of its own free will or through behaviour in relation to the act, confirm or validate it.

100. Invalidity arises in relation to conventional acts and in relation to unilateral acts and in either case can relate to both form and substance. In the former case, one must take into account the specificities of each one of these acts. While the expression of will is the same, the unilateral nature of the latter affects whatever conception one may seek to have of the defects and causes in general that may affect its validity. The unilateral act may be considered invalid if there are defects in its formulation, essentially related to the expression of will; it may also be regarded as invalid if it conflicts with an earlier norm or a peremptory norm of *jus cogens*. In the former context, we can say simply that the invalidity is related to the incapacity of the subject formulating the act and the incapacity of the person carrying it out, to the object and its lawfulness, and to the expression of will or defects in the declaration of intent. In the latter context, we would be dealing with the fact that the act conflicts with a peremptory norm of international law.

101. The form of the act, it should be remembered, does not affect its validity, as Judge Anzilotti pointed out in 1933, in his separate opinion in the case concerning *Eastern Greenland*,[80] which view was reaffirmed by the International Court of Justice in the case concerning the *Temple of Preah Vihear* and in the *Nuclear Tests* case.

102. In the case concerning the *Temple of Preah Vihear*, the Court stated:

> "Where ... as is generally the case in international law, which places the principal emphasis on the intentions of the parties, the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it."[81]

103. In the *Nuclear Tests* case, the Court stated that:

[80] P.C.I.J., 1933, *Series A/B*, No. 53, p. 71.
[81] *I.C.J. Reports 1961*, p. 31.

> "With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form. Thus the question of form is not decisive."[82]

104. In his third report the Special Rapporteur presented some of the causes of invalidity, which gave rise to comments both in the Commission and by representatives of States in the Sixth Committee; they will all have to be considered again in order to clarify the state of deliberations on this topic and to facilitate progress this year. Implementation of the Vienna rules was mentioned by some representatives in the Sixth Committee. It was pointed out, in this context, that invalidity of unilateral acts was an area in which it was acceptable to apply, mutatis mutandis, the norms of the Vienna Convention on the Law of Treaties; according to another view, it would be dangerous to rigorously apply the Vienna norms to unilateral acts in view of the distinctive nature of such acts.[83]

105. The causes relating to invalidity of unilateral acts were dealt with in draft article 5 which was referred to the Working Group for further consideration. Some of them relate to the expression of will, while others refer to conflict with a peremptory norm or a decision of the Security Council.

106. As regards defects in the expression of will, the issue poses no serious difficulties. The rules set forth in the Vienna Convention of 1969 apply to a large extent to the expression of unilateral will.

107. As regards unilateral acts that conflict with a peremptory norm of international law or *jus cogens*, at the fifty-second session of the Commission, several views were expressed concerning the importance of this cause of invalidity and it was indicated, inter alia, that such acts were invalid *ab initio*.

108. As regards unilateral acts that conflict with a decision of the Security Council, it was pointed out that, under Article 25 of the Charter of the United Nations, Members States were already bound to carry out the decisions of the Security Council. It was also suggested that the norm contained in Article 103 of the Charter could also apply to unilateral acts, so that obligations contracted under the Charter should take precedence over all other obligations deriving from a treaty or a unilateral act.[84]

109. The possibility that a State might lose the right to invoke a cause of invalidity or a ground for putting an end to the act by its behaviour, whether implicit or explicit, deserves special comment; these issues have been tackled already both in legal doctrine and in judicial practice in the context of the law of treaties, which must be considered as a guide. In the view of some "Following the conclusion of a treaty the conduct of the Parties becomes part of the agreement. This creates an obligation that makes it possible to overcome the initial obstacles to implementation of the treaty: defects in the agreement ..." He goes on to say that "There is no

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[82] *Nuclear Tests (Australia v. France), Judgment of 20 December 1974, I.C.J. Reports 1974*, p. 253, para. 45.

[83] A/CN.4/513, paras. 271 and 272.

[84] Ibid., para. 277.

defect — or almost no defect — in an agreement which cannot be overcome by the subsequent conduct of the Parties. The law of nations acknowledges that contracting parties may, by their subsequent attitude, regularize a treaty that is invalid *ab initio*."[85] There are also judicial precedents dealing with this issue. In the case concerning the arbitral award made by the King of Spain, the International Court of Justice ruled that Nicaragua could not challenge the award because it had applied the treaty that contained the arbitral clause. The Court stated that "In the judgment of the Court, Nicaragua, by express declaration and by conduct, recognized the Award as valid and it is no longer open to Nicaragua to go back upon that recognition and to challenge the validity of the Award."[86]

110. The issue that arises in the context of unilateral acts is somewhat different, and in this context we would have to make a distinction according to the legal effects of the act. The situation might be different according to whether we are dealing with a protest, a recognition, a promise or a renunciation. Questions arise as to whether it is possible to include a common clause, applicable to all unilateral acts. In the case of a renunciation, for example, the author State can invoke the invalidity of the act if it considers that the conditions required for the declaration or act to be considered valid have not all been met. In the case of a promise the same comment could apply. A unilateral act whereby a State undertakes to assume a particular conduct in the future may be invalid if the author State invokes a cause of invalidity. In the case of a protest, the issue could be approached from a different angle. While the author State can hardly invoke the invalidity of the act, it might be possible for the State to which the act is directed to do so.

111. In view of all this, we would have to consider whether the author State or the State that can invoke the invalidity of the act can lose the right to do so by its conduct or its attitude, whether implicit or explicit. A State that formulates an act containing a promise and acts expressly or behaves in such a manner as to suggest that it accepts that the act is valid cannot later on invoke the invalidity of the declaration. As in the context of the law of treaties — article 45 of the Vienna Convention of 1969 — we might consider the possibility of drafting a rule that would be applicable to unilateral acts, although we would have to determine whether a rule of this nature could be applicable to all unilateral acts.

112. Furthermore, it is important, also in the context of the non-application of unilateral acts, to refer to two other issues — termination and suspension of the act — which are considered and resolved in relation to treaties in the Vienna Convention on the Law of Treaties, particularly articles 54 to 64. In the context of unilateral acts, due to the characteristics of such acts, the situation is far more complex. The question is whether it is possible to transfer this regime to the context of unilateral acts and whether it is possible to speak of the "end" and "suspension" of such acts. Once again, this raises the difficulty of transferring the Vienna rules to the regime that we are trying to elaborate. Also in this context, there is the question of the different kinds of acts, according to their legal effects. A unilateral act

[85] Jean-Pierre Cot, "La conduite subséquente des Parties à un traité", RGDIP, 1966, vol. 37, No. 3, p. 658. He also points out that "it is acknowledged that the State can confirm a treaty ... the principle that a party cannot maintain a legal position that is in contradiction with its past conduct, makes up in part for the lack of prescription in international law". Philippe Cahier, "Les caractéristiques de la nullité en droit international et tout particulièrement dans la Convention de Vienne de 1969 sur le Droit des traites", ibid., 1972, vol. 76, No. 3, p. 677.

[86] *I.C.J. Reports 1960*, p. 213.

containing a promise must be looked at differently from a unilateral act whereby a State renounces or recognizes a particular situation. In the third part of the report we will look at this issue in greater depth.

113. We must also refer briefly to another aspect related to invalidity, the treatment of which is also based on the Vienna regime: domestic law concerning competence to formulate unilateral acts and the particular restriction of the power to express will. According to the Vienna regime, an act may be invalid if it is formulated in violation of a provision of domestic law concerning competence to formulate such acts, but this cause may be invoked only if the violation is manifest and if it concerns a norm of fundamental importance to the domestic law of the State.

114. Although the first issue seems applicable to unilateral acts, the second presents difficulties. Constitutions and domestic legal orders in general refer to treaties and international agreements but not to unilateral acts, which are not considered in the same way in that context. This issue will also be tackled at greater length in the third part of this report.

115. Lastly, it is noted that, as regards form, criticisms were expressed regarding the presentation of the causes of invalidity in a single draft article in the third report of the Special Rapporteur, as opposed to the formulation in the Vienna regime where articles 46 to 53 contain separate provisions for each cause. The new presentation of the causes in separate provisions makes it necessary to introduce the requisite changes. The new draft articles may serve as a basis for discussion in the Working Group which will have to be set up during this session.

116. The new draft articles 5 (a) to 5 (h) present within brackets, as a desirable alternative, a reference to the State [or States] that formulated a unilateral act. This alternative will reflect expressly the invocation of invalidity in the case of unilateral acts having a collective origin. If this alternative is accepted it might also be desirable to reflect just as expressly in the definition in article 1, the possibility of a collective unilateral act referred to in the said draft article as the unequivocal expression of will of "one or more States" or of "one or more other States". Another possibility would be to explain in the commentaries being prepared on article 1, that it relates to unilateral acts which may have an individual or collective origin and that this, in the context of article 5, may enable one of the author States to invoke the cause of invalidity.

117. The new wording specifies that it is possible to invoke a defect in "the expression of will" and absolute invalidity if the act conflicts with a peremptory norm of international law or *jus cogens* and if it is a result of coercion of the person formulating it on behalf of the State.

118. Lastly, it will be noted that it also specifies who can invoke the invalidity of unilateral acts. One case would be when the invalidity is relative; another would be when the unilateral act is invalid because it is contrary to a peremptory norm of international law or of *jus cogens* or because it was formulated as a result of coercion of the State, contrary to international law. In the first case it is understood that only the State or States that formulated the act could invoke the invalidity of the act, whereas in the latter case any State could invoke its invalidity.

119. The draft article could read as follows:

Article 5 (a)
Error

A State [or States] that formulate[s] a unilateral act may invoke error as a defect in the expression of will if [said] act was formulated on the basis of an error of fact or a situation which was assumed by that State to exist at the time when the act was formulated and formed an essential basis of its [expression of will] [consent] to be bound by the act. The foregoing shall not apply if the author State [or States] contributed by its [their] own conduct to the error or if the circumstances were such as to put that State [or those States] on notice of a possible error.

Article 5 (b)
Fraud

A State [or States] that formulate[s] a unilateral act may invoke fraud as a defect in the expression of will if it has/they have been induced to formulate an act by the fraudulent conduct of another State.

Article 5 (c)
Corruption of the representative of the State

A State [or States] that formulate[s] a unilateral act may invoke a defect in the expression of will if the act has been formulated as a result of corruption of the person formulating it, through direct or indirect action by another State.

Article 5 (d)
Coercion of the person formulating the act

A State [or States] that formulate[s] a unilateral act may invoke the absolute invalidity of the act if the act has been formulated as a result of coercion of the person formulating it, through acts or threats directed against him.

Article 5 (e)
Coercion by the threat or use of force

A State [or States] that formulate[s] a unilateral act may invoke the absolute invalidity of the act if the formulation of the act has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

Article 5 (f)
Unilateral act contrary to a peremptory norm of international law (*jus cogens*)

A State [or States] that formulate[s] a unilateral act may invoke the absolute invalidity of the act if, at the time of its formulation, the unilateral act conflicts with a peremptory norm of international law.

Article 5 (g)
Unilateral act contrary to a decision of the Security Council

A State [or States] that formulate[s] a unilateral act may invoke the absolute invalidity of the act if, at the time of its formulation, the unilateral act conflicts with a decision of the Security Council.

Article 5 (h)
Unilateral act contrary to a norm of fundamental importance to the domestic law of the State formulating it

A State [or States] that formulate[s] a unilateral act may invoke the absolute invalidity of the act if it conflicts with a norm of fundamental importance to the domestic law of the State formulating it.

C. Interpretation of unilateral acts

120. In the fourth report the Special Rapporteur dealt with the interpretation of unilateral acts, which, while different from the formulation of such acts in that it falls within the context of their application, may be subject to common rules, that is, rules which can be applied to all unilateral acts, irrespective of their classification, content and legal effects.

121. When the topic was taken up at the fifty-third session of the Commission, some members felt that consideration of the rules of interpretation was premature and that they should be dealt with at a later stage in the elaboration of the draft. Nonetheless, the Special Rapporteur is of the view that it is useful to consider them in this phase of the Commission's study of the topic, particularly since, as he has suggested, the rules of interpretation can be elaborated separately from the content and legal effects of unilateral acts.

122. The reference to Vienna is always the subject of commentaries. In the case of interpretation, some members agreed that, in view of the fundamental differences between conventional and unilateral acts, the provisions of the Vienna regime, while important, should be adapted to the specific character of unilateral acts. This view is not shared by all members, some of whom believe that the provisions of the Vienna Conventions on the Law of Treaties are too vague to be applied to unilateral acts.

123. In this connection, the most recent opinion given by the International Court of Justice on declarations of acceptance of its compulsory jurisdiction should be noted. Although it might not be "of a strictly unilateral nature", it is a unilateral declaration from the formal point of view and hence, as the Court itself indicated, a sui generis declaration. This was in connection with the examination by the International Court of Justice of the declaration of acceptance of jurisdiction in the *Fisheries Jurisdiction Case* (*Spain v. Canada*), which, in its 1998 preliminary decision, indicated that:

> "A declaration of acceptance of the compulsory jurisdiction of the Court [...] is a unilateral act of State sovereignty. At the same time, it establishes a consensual bond and the potential for a jurisdictional link with the other States which have made declarations pursuant to Article 36, paragraph 2, of the Statute, and 'makes a standing offer to the other States party to the Statute which have not yet deposited a declaration of acceptance' (*Land and Maritime*

Boundary between Cameroon and Nigeria, Preliminary Objections, I.C.J. Reports 1998, p. 291, para. 25)."[87]

124. The Court indicated, with regard to the interpretation of such declarations, that:

> "The regime related to the interpretation of declarations made under Article 36 of the Statute is not identical with that established for the interpretation of treaties by the Vienna Conventions on the Law of Treaties (...). Spain has suggested in its pleadings that '[t]his does not mean that the legal rules and the art of interpreting declarations (and reservations) do not coincide with those governing the interpretation of treaties'. The Court observes that the provisions of that Convention may only apply analogously to the extent compatible with the sui generis character of the unilateral acceptance of the Court's jurisdiction."[88]

125. In 2001, some delegations in the Sixth Committee expressed support for the Special Rapporteur's approach of adopting the rules of interpretation contained in the 1969 Vienna Convention on the Law of Treaties. However, doubts were also expressed that this would be feasible, given the specific nature of unilateral acts. Some felt that the starting point should be the interpretative needs of the unilateral act, followed by a finding of whether such needs would be well served by the appropriate rules of the Convention.[89] Others felt that the intention of the author State should be a main criterion, and thus greater emphasis should be given to preparatory work which offered a clear indication of the intent.[90] Members also said that the object and purpose of the unilateral act, which the Rapporteur considered fundamentally treaty-based, should be taken into account for the purposes of interpretation.

126. It should be recalled, and on this there is broad agreement, that the general rule of interpretation of the unilateral act should be based on good faith, and on its conformity with the ordinary meaning attributed to the terms of the declaration, in its context and in the light of the author's intent.

127. In the *Fisheries Jurisdiction* case, the International Court of Justice, in analysing the declarations of acceptance of its jurisdiction, clearly indicated that it interpreted the relevant words of a declaration in a natural and reasonable way, having due regard to the intention of the State concerned, which may be deduced not only from the text of the relevant clause, but also from the context in which that clause is to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served.[91]

128. Unilateral acts, by their very nature, should be interpreted differently from conventional acts. On the one hand, as indicated in the fourth report submitted by the Special Rapporteur, "the interests of legal certainty require that the main criterion should be the will expressed in the text (...) and, furthermore, such acts should be interpreted restrictively",[92] as the Court itself pointed out, in particular, in

[87] *I.C.J. Reports 1998*, p. 453, para. 46.
[88] Ibid.
[89] A/CN.4/521, para. 114.
[90] Ibid., para. 115.
[91] *I.C.J. Reports 1998*, paras. 47 and 49, p. 454.
[92] A/CN.4/519, para. 126.

the *Nuclear Tests* case referred to above. Some Governments also indicated that the restrictive criterion should predominate in the interpretation of the unilateral act.[93] In general, legal doctrine supports this view. Thus, for example, Grotius says that "The measure of correct interpretation is the reference of intent from the most probable indications."[94]

129. The purpose of the interpretation is to determine the intention of the State, which can be deduced from the declaration formulated and other elements considered, such as the preparatory work and the circumstances at the time of the formulation of the act. The term "intention" is fundamental. The display of will is the necessary expression of the formulation of the act, while intention is the meaning which the author intends to give to the act. Intention, however, would not be sufficient in the determination of the act, since the said intention must be known to the addressee or addressees, or at least they must have had an opportunity to become aware of it.

130. Paragraph 2 of article (a), proposed in 2001, specified that the context comprised "in addition to the text, its preamble and annexes". On this, it must be specified that there were some doubts as to the preambular part but, in our view, the elaboration of a legal act, whether it is a conventional act or a unilateral act, can be preceded by a preambular part, as illustrated by the Egyptian declaration of 1957 and, less clearly, the French declarations considered by the Court in the *Nuclear Tests* cases, referred to in previous reports. The same assessment can be made with regard to the annexes. There is no reason why a unilateral act cannot be followed by or composed of annexes, in addition to its operative part.

131. The phrase "given to the terms of the declaration in their context and in the light of the intention of the author State" constitutes an important reference in establishing the general rule of interpretation of these acts. Consideration of the context, far from being contradictory, complements the unilateral act for the purposes of interpretation.

132. Recourse to the preparatory work submitted by the Special Rapporteur in 2001 in the draft he submitted to the Commission at that time was questioned by some members who felt that this was not possible and that, moreover, access to it would be difficult, considering that it might include the internal correspondence of ministries of foreign affairs or other organs of State. While consideration of the preparatory work from a perspective other than that of the Vienna regime is important in this context, the Special Rapporteur believes that, given the observations formulated at the previous session, the Commission could reconsider this case in order to determine whether or not such work, given the difficulties in obtaining or having access to it — which, in fact, depends on the unilateral decision of the requested State — could be considered in the draft articles on supplementary means of interpretation, as set forth in the relevant article of the 1969 Vienna Convention. This reference is therefore left between square brackets in the revised version of the draft submitted in the fourth report.

133. In reference to the "object and purpose" of the act, the Special Rapporteur continues to believe that both terms have a fundamentally treaty-based connotation

[93] Commentary by the Government of Argentina transcribed above.

[94] H. Grotius, *De jure belli ac pacis*, Book 2, Ch. 16. Cf: *Encyclopedia of Public International Law* (Amsterdam, Elsevier, 1995), vol. II, p. 1418.

and, as such, there should be no reference to them in the rules of interpretation of unilateral acts. In this case, as proposed in the draft article submitted in 2001, unilateral acts should be interpreted "in the light of the intention of the author State or States".

134. Finally, although this is not reflected in the draft article on interpretation, it can be said that the restrictive criterion must predominate in the exercise of the interpretation of such acts, as upheld by legal doctrine, affirmed by Governments and indicated by case law. In this latter context, we note that — although it was in reference to promises only — the International Court of Justice in the *Nuclear Tests* case concluded: "When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for."[95]

135. The following draft article is the version likely to be considered by the Commission at its fifty-fourth session:

Interpretation

Article (a)
General rule of interpretation

1. A unilateral act shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the declaration in their context and in the light of the intention of the author State.

2. The context for the purpose of the interpretation of a unilateral act shall comprise, in addition to the text, its preamble and annexes.

3. There shall be taken into account, together with the context, any subsequent practice followed in the application of the act and any relevant rules of international law applicable in the relations between the author State or States and the addressee State or States.

Article (b)
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including [the preparatory work and] the circumstances of the formulation of the act, in order to confirm the meaning resulting from the application of article (a), or to determine the meaning when the interpretation according to article (a):

(a) Leaves the meaning ambiguous or obscure; or

(b) Leads to a result which is manifestly absurd or unreasonable.

D. Classification of unilateral acts and structure of the draft articles

136. In both the Commission and the Sixth Committee, there has been a significant tendency to consider that it is not possible to apply common rules to all unilateral acts, even though, as the Special Rapporteur has noted, this might be possible with regard to some aspects, such as those relating to their formulation and particularly

[95] *Nuclear Tests (Australia v. France), Judgment of 20 December 1974, I.C.J. Reports 1974*, p. 267, para. 44.

their elaboration: definition, capacity to formulate acts, qualified persons, conditions of validity and causes of invalidity, which are related to the manifestation of will that is common to all acts, irrespective of their content, and even, as we saw above in the context of their application, of the rules relating to the interpretation of such acts.

137. The Special Rapporteur considers that the classification of these acts goes beyond a simple academic exercise and appears to be fundamental for structuring the draft articles, since grouping the acts on the basis of their effects or any other criteria would simplify that task. As he has said, this requires valid criteria to be established and that is clearly a complex matter, as can be seen from his fourth report in which he examined the matter at length, in the light of a large body of literature, concluding that these acts could be grouped into two major categories, around which the draft articles governing their functioning could be structured. Otherwise, in view of the diversity of legal effects of the many kinds of unilateral acts, it would be impossible to structure a set of draft articles without the risk of excluding some acts. As will be recalled, the Special Rapporteur indicated that unilateral acts could be grouped into two principal categories: acts by which the State assumes obligations and unilateral acts by which the State reaffirms its rights. There is fairly broad agreement that these acts cannot impose obligations on third States that have not taken part in their elaboration, without the latter's consent. However, we cannot overlook the fact that some authors maintain that this possibility is feasible. According to this point of view, a State can formulate an act in order to establish rights and, consequently, impose obligations on third States, an issue that has been examined in this report and in previous ones.

138. Certainly, opinions regarding this exercise were not unanimously favourable, and they were even less so with regard to the criteria that might be established to group these acts together and, on that basis, structure the draft articles envisaged by the Commission. Several members of the Commission have indicated that classification is neither an easy nor a reliable task, and even that it is too academic, whereas the issue deserves a more practical approach. Moreover, one member considered that, besides lacking in importance, classification created unnecessary confusion. It was indicated, and this is true, that case law has attached greater importance to determining whether an act was binding in nature, than to the type of act in question.

139. During the debate in 2001, some members indicated that certain acts could belong to both categories; these included declarations of neutrality, by which a State not only assumed obligations but also reaffirmed its rights, or a declaration of war. Clearly, it is not easy to qualify some acts and place them in a single classification. With regard to this assertion, it is worth pondering whether declarations of neutrality can constitute autonomous unilateral acts or whether they constitute waivers and promises; in other words, whether their legal effects are similar to those of waivers and promises.

140. Indeed, when a State formulates a declaration by which it waives a right, it may at the same time be recognizing a legal claim of another State and promising to behave in a certain way in the future. A declaration of neutrality, which should not be classified as a simple act but rather as a mixed act by which, as mentioned above, a State could assume obligations while reaffirming rights, clearly illustrates the difficulties posed by the classification and qualification of unilateral acts.

141. Members of the Sixth Committee also expressed divergent opinions about the classification of unilateral acts. Some were of the view that classification is unnecessary or valid only from an academic point of view, while others considered it to be an important step in the elaboration of rules on the topic. It was also suggested that a classification could be elaborated provisionally based on the criterion of legal effects.

142. A decision must be taken on this matter in order to deal with the topic because, as the Special Rapporteur indicates, there appears to be general agreement within the Commission and the Sixth Committee that it is not possible to elaborate common rules applicable to all acts and that, accordingly, in view of the diversity of the acts and their legal effects, the rules applicable to the different acts or the different categories of acts must be grouped together.

143. For several reasons, it does not seem possible to have recourse to an extreme and excessively broad conception in the sense that groups of rules could be elaborated for each of the material acts to which the literature refers most frequently, for several reasons: first, as indicated, the diversity of these acts and their uncertainties, and second, the impossibility of qualifying them easily, which to some extent has implications for their legal effects.

144. The Commission has held (and this can be seen in the questionnaire prepared in 1999) that the most important unilateral acts are promise, recognition, waiver and protest. Thus, the reply from the Government of Argentina indicated that "A clear distinction must be drawn among the four traditional kinds of unilateral act: promise, waiver, recognition and protest".[96] This assumption is useful, but it still does not resolve the problem of the diversity of unilateral acts and how they may be determined easily. There are no specific criteria for defining them, nor is there a unanimous opinion on all their aspects — nor even, it appears, on the existence of a determinate number of acts. To accept such an idea would imply considering an excessively broad structure, one even impossible to establish definitively, owing to the uncertainty that apparently exists with regard to material acts.

145. Classification is undoubtedly important, even though it is a complex task, not devoid of difficulties. The Special Rapporteur hopes that the Commission will continue to examine the issue and that a decision will be taken during this year's session.

146. Although discussions should continue on the question of classification, it is possible to continue on the basis of a conclusion that could be reached for different reasons, including those of a practical nature: some rules, including those relating to the formulation of the act and its interpretation, may be regarded as common to all acts.

147. Acts are a unilateral manifestation of will, an element that appears to be essential, even though a final definition of such acts has not been determined. The manifestation of will, in addition to being common to all such acts, is a single one. All the unilateral acts that interest us derive from that manifestation, and that characteristic allows them to be the subject of common rules. Thus, draft articles

[96] A/CN.4/511, p. 14.

have been submitted on definition, the capacity of States, persons qualified to formulate the act, subsequent confirmation of the act, factors vitiating consent and even a general regime governing conditions of validity and causes of invalidity of the act.